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Issue Date: 21 September 2004

CASE NO: 2003-LHC-02681

OWCP NO: 02-118142

In the Matter of

ROBERT GOLDBACH
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, Incorporated
Employer

and

ACE AMERICAN INSURANCE COMPANY
Carrier

Appearances:

Philip J. Rooney, Esquire
For Claimant

Monica F. Markovich, Esquire
For Employer and Carrier

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Defense Base Act ("DBA"), 42 U.S.C. § 1651(a), extension of the Longshore and Harbor Workers' Compensation Act ("The Act"). 33 U.S.C. § 901 *et seq*.

Service Employers International, Incorporated and Ace American Insurance Company (referred to hereinafter collectively as "Employer") entered into a voluntary agreement with Robert Goldbach ("Claimant"), under which Claimant was paid the maximum compensation rate allowable under the Act from February 12, 1996 until August 19, 2003 as a result of a disability that Claimant suffered while working for Employer in Croatia. Thereafter, Employer decided

that Claimant was not entitled to that amount and began paying Claimant $261.14 per week.[1] Claimant disagreed and the matter was scheduled for a formal hearing.

The matter was transferred to the Office of Administrative Law Judges by letter dated August 28, 2003 and the hearing was originally scheduled for February 23, 2004 before Administrative Law Judge ("ALJ") Paul H. Teitler. Judge Teitler granted Employer a continuance on January 7, 2004 and thereafter the case was reassigned to me on January 14, 2004. The hearing in this matter was held on March 18, 2004 in New York, New York, at which time all parties were given the opportunity to present evidence.[2] The parties agreed that additional discovery was needed, and I left the record open for 90 days following the hearing.[3] Post-trial briefs were filed on behalf of the parties on August 9, 2004.[4]

This Decision is rendered after careful consideration of the complete record, the arguments of the parties and the applicable law.

STIPULATIONS AND ISSUES

In pertinent part, the parties stipulate and I find that:

1. The date of injury was February 10, 1996
2. The injury occurred in Croatia.
3. The injury was to the back.
4. The parties are subject to the Act.
5. At the time of the injury, an employer/employee relationship existed between Claimant and Service Employers International.
6. Employer was timely notified of the February 10, 1996 injury.
7. Notice of controversion was filed on December 8, 2000.
8. The injury resulted in disability.
9. Carrier has paid the medical benefits under the Act in the amount of $110, 982.99.
10. Employer paid Claimant compensation from February 12, 1996 until August 19, 2003 at the rate of $782.44.
11. Benefits in the amount of $186.14 have been paid since August 20, 2003 and continue to be paid.

(Tr. at 5-6).

Four issues were presented for my resolution[5]:

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[1] Employer has actually been paying Claimant $186.14 per week, because Employer feels it is entitled to a credit, which it has been taking at a rate of $75.00 per week, for the amount paid prior to August 20, 2003.

[2] The transcript of the hearing consists of 102 pages and will be referred to as "Tr. at –." Claimant submitted 18 exhibits at the hearing and they were admitted into evidence. Employer submitted 66 exhibits, which were also admitted but later withdrew Exhibits 44, 45, 46, 48, 49, 50, 53 and 56.

[3] After the hearing, Claimant submitted 9 exhibits. They are herewith admitted, with the exception of Exhibits 23 and 24. *See p. 3 infra*. Claimant's exhibits will be referred to as "CX-1" through "CX-27." Employer submitted 17 exhibits following the hearing and they are herewith admitted. Employer's exhibits will be referred to as "EX-1" through "EX-83."

[4] Claimant's brief will be cited as "CB at --" and Employer's brief will be cited as "EB at --."

[5] While Employer raised the issue of § 8(f) relief at trial (Tr. at 6), the application for such relief was later withdrawn

1. whether Claimant has an alternate earning capacity or is totally disabled,
2. the date that maximum medical improvement (MMI) was reached,
3. the amount of Claimant's average weekly wage ("AWW"),
4. whether the sexual dysfunction and Hepatitis C suffered by Claimant were a result of the February 10, 1996 injury and
5. whether Claimant's exclusive remedy is provided by the Defense Base Act.

EVIDENTARY RULINGS

Employer has objected to three of the exhibits that Claimant submitted following the formal hearing. I will briefly address each objection.

Employer objects to CX-23 and CX-24, which purport to prove Claimant's salary history. CX-23 is a letter from Bill R. Brewer, who was Claimant's superior when Claimant worked for Edward Gray Corporation many years ago. The letter discusses Claimant's hours, earnings and benefits while in the employ of Edward Gray Corporation. CX-24 is a letter from Michael Presta, which discusses in general the wages that electrical supervisors earned between 1989 and 1997. Employer objects to both CX-23 and CX-24 on the grounds of relevance, improper foundation and failure to disclose the identity of the witnesses in order to allow cross-examination. (EB at 3).

Employer also objects to CX-23 because it is not signed by Mr. Brewer and because Mr. Brewer could not specify the years that Claimant worked for Edward Gray Corporation but offered very specific information regarding Claimant's wages and hours. (EB at 3).

Employer objects further to CX-24 because it appears to be expert testimony and there is no indication that Mr. Presta is an expert. (EB at 3). Nor does Mr. Presta's letter demonstrate that he knows enough about Claimant to form an opinion regarding his prior earnings. Employer's brief states "None of Mr. Presta's employers are identified by name, there is no indication that he has any knowledge or understanding of Claimant's skills and abilities, and this is no evidence that he is familiar with any of the specific projects on which Claimant was employed." (EB at 3). Further, Mr. Presta's letter does not specify that Claimant ever worked for or with him.

I sustain Employer's objection as to both CX-23 and CX-24 based on the foregoing arguments, in conjunction with Employer's contention that the first notice Employer had that Claimant would be offering such correspondence was provided one day prior to the post-hearing discovery deadline. (EB at 4).

Next, Employer objects to CX-27, a letter from Claimant to his attorney dated July 8, 2004 and reporting additional steps that Claimant took to investigate alternate employment opportunities. Employer bases its objection on the fact that the letter is dated on the last day of discovery, leaving insufficient time for Employer to investigate its contents. Employer also states that Claimant's July 8 letter has no probative value since even if Claimant did take the steps he purports to have taken in his letter, they were untimely and would not have led to a job

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by letter dated August 4, 2004.

offer prior to the close of discovery, and therefore do not prove a diligent but unsuccessful effort to obtain employment. (DB at 3).

It is irrelevant that this exhibit was submitted near or at the discovery deadline because Claimant had testified previously on this precise subject matter, therefore putting Employer on notice that such additional evidence may be forthcoming. (CX-25). If discovery had to be submitted a fixed time in advance of the deadline, that would defeat the purpose of a deadline. In addition, I find that the letter does have some probative value even if it does not by itself prove diligence on the part of Claimant. Thus, CX-27 is admitted into evidence over Employer's objection.

SUMMARY OF THE EVIDENCE

Claimant was the only witness to testify at the formal hearing. He testified as to his employment and income prior to the February 10, 1996 injury, the injury itself, the treatment that he has received as a result of such injury, and his physical condition from 1996 until the present. (Tr. at 22-98).

Over one-hundred exhibits are in evidence. Having carefully reviewed each one, I discuss only those that were necessary to my decision.

Deposition transcripts of the following medical professionals were admitted into evidence: Dr. Capicotto, Claimant's treating physician; Dr. Barrash, a neurological surgeon and Employer's consultant; and Dr. Leone, an orthopedic surgeon who conducted an independent medical examination. Reports from numerous other medical professionals were also accepted into evidence.

Deposition transcripts or reports of the following employment experts were admitted into evidence: Joseph Higgins, a registered occupational therapist; Cathy Russo, a registered rehabilitation therapist; and Susan Rampant, another registered occupational therapist.

Other evidence consists of: the deposition testimony of Claimant; a letter from Claimant to his attorney detailing additional steps that Claimant took to secure employment; the deposition testimony of Mike Doyle, a senior recruiter for Employer; two recent decisions involving the DBA to which Employer was a party; employment and Social Security records regarding Claimant; Claimant's personnel file and the employment contract entered into by Claimant and Employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statement of Facts

1. Evidence Introduced by Claimant

Claimant's Testimony at the February 23, 2004 Hearing

Claimant testified that he was discharged from the United States Army and entered the

workforce in 1974. (Tr. at 23). Within a few years, he was working as an electrician's helper and had become a master electrician by the late 1970's. (Tr. at 23).

In the 1980's, for approximately 10 years, Claimant worked in the Cayman Islands as an electrical foreman and supervisor. (Tr. at 24). He was paid 30 Cayman Island dollars per hour plus housing and transportation. (Tr. at 24).

Next, Claimant worked in various electrical jobs in the United States, including projects in Florida, West Virginia (Tr. at 24-25), Nevada and Arizona (Tr. at 60-61). He testified that these positions were supervisory in nature and that he earned between 1,200 and 4,000 dollars per week during this time. (Tr. at 25). However, Claimant admitted on cross-examination that some jobs may have paid less per week. (Tr. at 65). Also, there is little or no documentation of most of these positions, as Claimant admitted that he has not filed income tax returns for approximately the past 25 years. (Tr. at 59). Claimant also testified that while working at one of these jobs, he claimed 7 exemptions on his W-4 form "to keep the amount down because [he] hadn't filed income tax and figured what they get is what [he] owe[s] them." (Tr. at 61-64).

Sometime in 1995, Claimant learned of a business opportunity with Employer in Croatia. (Tr. at 27). He applied for a position and was subsequently contacted by a human resource worker for Kellogg Brown & Root ("Brown & Root), Employer's parent company, for an interview, which took place in November of 1995. During that interview, Claimant was told that the employment contract was for three months but that the project would likely go on for much longer. (Tr. at 27-28). In addition, the contract contained provisions for certain benefits that the employee would receive after 180 and 270 days. (Tr. at 93). The Brown & Root employee also explained that the working conditions in Bosnia were primitive and that Bosnia was a war zone. (Tr. at 29).

Claimant then took a position in Texas as a journeyman but could not recall his rate of pay. (Tr. at 26). This was a union position and Claimant accepted it in order to have work until he was sent abroad to begin working for Employer. (Tr. at 26). While working as a journeyman, Claimant remained in contact with Employer and within a few months he went to Houston, Texas for orientation. Afterward, he signed an employment contract with Employer and was sent oversees in early-February of 1996. (Tr. at 29-30). Claimant testified that the work that he would be required to do in Bosnia pursuant to the employment contract was essentially the same type of work that he had done for the past five years in the United States. (Tr. at 60).

On February 5, 2004 Claimant boarded the plane chartered by Employer, which stopped in Zagreb, Croatia. (Tr. at 41). In Zagreb, Claimant began to unload cargo, at which point he felt a strain in his back. However, Claimant testified that the pain was not very intense and he thought it was "nothing more than a sprain." (Tr. at 41). That evening, Claimant was taken to a Zagreb hotel to wait for the trip to Bosnia. (Tr. at 42). When that time arrived, Claimant was to load cargo onto a pickup truck and drive it to Bosnia. Claimant testified that while he was securing the load, he slid on ice and fell on his back but did not feel any immediate pain. (Tr. at 42).

As the trip went on, according to his testimony, Claimant's pain worsened. (Tr. at 43). Eventually, he had to stop the convoy and another driver had to take over. Claimant stayed on his back for the rest of the ride. The next morning, he was still having difficulty sitting and standing and was taken to the local hospital. (Tr. at 43). Claimant testified that he believes that he was given an injection for pain at the hospital. (Tr. at 45).

Claimant testified that he was "in pain and out of it most of the time," but recalls going to a motel where he was helped to the third floor and then stayed there for at least two days before he again saw any of Employer's personnel. (Tr. at 43-44). When personnel finally did return, he was able to shower and then was told that he was being taken back to Zagreb. He was put into a van and taken back to Zagreb, where he was given a plane ticket back to Houston, Texas. (Tr. at 44).

The plane stopped in Germany, where Claimant saw a doctor and was given pain killers to help him sustain the remainder of the flight to Texas. (Tr. at 45-46). Upon arriving in Texas, Claimant saw another doctor and was hospitalized for three days, where he underwent traction. Upon release from the hospital, Claimant was instructed to attend physical therapy, which he did. After the therapy, Claimant felt better and stayed in a hotel waiting to be sent back overseas to continue working for Employer. (Tr. at 45).

However, Employer notified Claimant that his "services were no longer required." (Tr. at 47). At that time, Claimant returned to Buffalo, New York via airplane. During the flight, Claimant began to experience back pain after an hour or an hour and a half. As a result, Claimant arranged to see his family doctor in New York. (Tr. at 47).

In October 1997, Claimant had his first back surgery. (Tr. at 48). The surgery was not successful, according to Claimant's testimony. Afterward, he could not stand or walk. He had to crawl to the bathroom. A hospital bed was set up for Claimant, where he slept for the next three months, until the next operation. In early February, 1998, Claimant underwent a second operation. This operation was a fusing of the lumbar spine. (Tr. at 48).

Claimant also testified that he has experienced sexual dysfunction as a result of one or both of these surgeries. (Tr. 48-49). He saw Dr. Profetto, who did a test to monitor Claimant's erections through the night, and the Doctor reported that the readings were the lowest that he had ever seen. Claimant also testified that he had not experienced sexual dysfunction before. (Tr. at 49).

In addition, Claimant was diagnosed with Hepatitis C after his first operation. (Tr. at 50). He testified that he believes it may have been the result of being injected with an unclean needle in the Croatian hospital. (Tr. at 96).

As to alternate earning capacity, Claimant testified that he contacted 90 percent of the employers listed by the rehabilitation counselor hired by Employer. (Tr. at 54). He admits that as of the date of the hearing he did not go in person to apply for any of the jobs (Tr. at 58) but reports taking handwritten notes while making these contacts via telephone.[6] Claimant also

[6] Claimant's handwritten notes were marked as CX-18 and admitted into evidence.

reported that much of the information was flawed, in that a listed contact person was not the true contact person or no-one at the listed phone number knew anything about the job. Despite this, Claimant testified that he investigated some of these jobs further. (Tr. at 55). He found that many of the jobs were full-time positions or were part-time but would require him to work eight hour shifts, and he feels that he is only capable of working a couple of hours per day some days and not at all on his worst days. (Tr. at 56-57). Claimant admits that as of the date of the hearing, he made no other effort to find work. (Tr. at 58).

He testified that most of the jobs that he has held in his professional life were only short-term projects. Still, he never went for more than one month without work. (Tr. at 68).

In addition, Claimant admitted at the hearing that he refused to do any lifting tests administered by Employer's functional capacity evaluator. (Tr. at 83-84). He testified that any lifting causes him pain and that the device that he was asked to use in order to complete the test looked heavy. (Tr. at 84).

Currently, Claimant reports that he experiences severe pain in his back and numbness in his left thigh, in addition to shooting pains across the buttocks and down the right leg. (Tr. at 50). He can drive for about a half hour before the pain becomes too severe. (Tr. at 53). Claimant also testified that he suffers from drop foot and must take a break after walking about one block. (Tr. at 50). In addition, he reported laying down several times a day to stretch his back out, which relieves his pain. (Tr. at 54). As of the date of the hearing, Claimant was taking OxyContin, a narcotic, and Visceral for pain. (Tr. at 50). Claimant is receiving Social Security benefits, which are reduced by the amount of any Workman's Compensation benefits that he receives. He also receives Medicare, which pays for any health condition unrelated to the injury now before us. Tr. at 73).

Evidence Regarding the Employment Relationship

Claimant and Employer each submitted a copy of the employment contract ("the contract") into evidence. (CX-1; EX-31). The contract provides that Claimant was to work as an electrical foreman for "three months or the duration of the job, subject to additional extensions." It does also state that Employer is under neither an express or implied duty to renew the contract.

Claimant was to be compensated at a base rate of $3,557 per month, with a 15% foreign service bonus, a 25% work area differential while in Bosnia (10% while in Croatia), and hazard pay, which also would be equivalent to 25% of the base pay only for time spent working in Bosnia. Any overtime was to be paid at the normal hourly rate. Claimant's initial assignment location was specified as Bosnia.

The contract also provides that Claimant was entitled to interim leave after 90, 180, 270 and 365 days of employment in which Employer would pay to send Claimant on trips alternating between London, England and Claimant's point of origin. Claimant's point of origin was specified in the contract as Buffalo, New York. In addition, the contract provides for living quarters, meals and transportation.

The contract also states that "Employee's sole recourse for any injury…shall be such as is provided under the Defense Base Act or the Brown & Root Extraterritorial Occupational Injury Plan, whichever may be applicable." In addition, it states that all claims related to the contract are to be resolved by arbitration, to be held in Houston, Texas under the laws of the United States. (CX-1; EX-31).

Claimant's Deposition and Letter to Counsel

Claimant also introduced the transcript of his deposition into evidence. (CX-25). Both counsel for the Claimant and counsel for Employer focused only on Claimant's efforts to obtain alternate employment. Claimant testified that he contacted all 7 employers listed by Susan Rapant of Rapant, McElroy & Associates.[7] However, Claimant was unable to find suitable employment for a variety of reasons, such as no positions were available or the positions required an 8 hour work day. Some employers never contacted Claimant although he left messages for them. One position involved cleaning out storage sheds, which Claimant did not feel that he was capable of doing, given his current condition. Another position was over 30 miles from Claimant's home, which presents a problem since Claimant experiences great pain when driving in excess of a half hour. (CX-25).

Since the deposition, Claimant has taken additional steps to contact four of these employers. These contacts include going to the employers' locations and filling out applications. (CX-27).

Medical Evidence

The deposition of Dr. William N. Capicotto, M.D. was taken on June 29, 2004. (CX-26). Dr. Capicotto is Claimant's treating physician and is a board certified orthopedic surgeon, specializing in spinal surgery. He testified that he first saw Claimant on May 30, 1996 in relation to this injury. Dr. Capicotto performed a microdiskectomy on Claimant's back on October 27, 1997 and anterior fusion surgery[8] on February 4, 1998. (CX-24). Dr. Capicotto testified that he would consider the first surgery successful but in an October 27, 1997 report he notes that Claimant bled profusely during the operation, and therefore, there was no exploration of the L5-S1 area of the spine. (CX-3). The second surgery was an anterior fusion, which the record as a whole suggests was successful, although there may have been some loosening of the cages since that surgery.

It was the testimony of Dr. Capicotto that Claimant's condition is permanent. When asked if Claimant's disability is total, Dr. Capicotto responded, "Well, if it's not total it's got to be very close. I just, I would feel safer in saying he's got a total disability." (CX-26). However, on cross-examination, Dr. Capicotto admitted that Claimant may be capable of sedentary to light work and that he does at times wonder about Claimant's level of pain, given that Claimant has traveled internationally since the injury but reports that he cannot drive for more than a half-hour. (CX-26). Upon further examination, Dr. Capicotto testified that he cannot remember

[7] Ms. Rapant's report was admitted into evidence as EX-69 and is discussed below.

[8] This consists of the surgeon entering the patient's body from the front and inserting metallic devices, referred to as cages, into the spinal area.

whether he discussed these international flights with Claimant, but he has in the past instructed patients just to be sure to get up from their seats every hour or couple of hours to reduce pain. Dr. Capicotto continues to see Claimant, although less frequently now that eight years have elapsed since the injury. (CX-24).

Dr. Capicotto testified that Claimant's sexual dysfunction is likely a result of Claimant's back injury. (CX-24).

The record contains the report of Dr. Perfetto, who treated Claimant for sexual dysfunction. (CX-12). Claimant reported that he did not experience any sexual dysfunction until the time of his back injury. Dr. Perfetto prescribed Viagra and Claimant subsequently reported that he had attained an erection while using Viagra but was not able to ejaculate. Dr. Perfetto's reports advised Claimant that one of the medications that he was taking for pain can delay orgasm and ejaculation. (CX-12).

2. Evidence Introduced by Employer

Evidence Regarding the Employment Relationship

Mike Doyle, a senior recruiter for Employer, was deposed on March 17, 2004 and the transcript of the deposition was admitted into evidence. (EX-47). Mr. Doyle has been working for Brown & Root for 37 years. In December of 1995, he began recruiting individuals to work in the Balkans building bases for the United States armed forces pursuant to a contract between Brown & Root and the U.S. government. This project is commonly referred to as LOG CAP 1.

The contract between Brown & Root and the government was initially for a duration of 3 months, which led to the length of the employment contract between Employer and the new hires to be for 3 months also, according to Mr. Doyle's testimony. However, LOG CAP 1 began in December of 1995 and continued until some time in 1999. The contract was extended several times, at first for additional 3 month periods but later for periods of one year. However, when the contract was extended for a one year period, the foreign service bonus paid by Employer to the employees dropped from 15 to 5 percent, according to Mr. Doyle.

Mr. Doyle testified that Employer advertised job vacancies in several different ways and then would respond by telephone to resumes it received. If satisfied with the conversation and qualifications of an individual after the phone conversation, the individual would be brought to Houston, Texas for a period of four days. During this time, the prospective employee would undergo a physical and drug test. He also would be instructed by the safety department regarding the conditions, hazards and nature of the work to be done in the Balkans. If all went well, on the fourth day the individual was flown to the Balkans to begin work and was compensated from the point of take off.

Once in Bosnia, the employees' main responsibility was to construct whatever facilities the armed forces needed. Mr. Doyle testified that until this was completed, the employees lived in primitive conditions, sleeping in tents or warehouses at times and eating ready-to-eat meals or sandwiches. Only when the armed forces' facilities were taken care of could the employees

build accommodations for themselves and begin to prepare hot meals. Mr. Doyle testified that once the work for the military was near completion, numerous people were sent home leaving only the personnel necessary to maintain the construction, which he estimated to be about one tenth of those needed during the peak of the project. This project, according to Mr. Doyle peaked in March of 1996 and only one electrical foreman was hired after that date.

Employees sent abroad under the LOG CAP 1 contract were paid a base rate plus a fifteen percent foreign service differential (later reduced to five percent in 1997), a twenty-five percent differential for Bosnia, and a twenty-five percent hazard pay for Bosnia. However, an employee whose destination was specified as Bosnia could have been sent to any of the theater of operations, which including Croatia, Bosnia and Hungary, from day to day and would be paid for that day according to the differentials for that country. In addition, according to Mr. Doyle, an employee was not guaranteed to work forty hours per week, although sometimes employees had to work more than that.

Mr. Doyle testified that an electrical foreman in Bosnia could expect to make approximately $5,800 per month. He also testified that although he is not responsible for hiring electrical foreman to work in the United States, Brown & Root does employ such people, and his best estimate is that they make approximately 19 dollars per hour. Upon further testimony, it seems that Mr. Doyle inferred that the base rate of pay, which was $3,557 per month in Claimant's case, is what these employees are likely to be paid for work in the United States.

Mr. Doyle testified that Claimant was paid $1,190.16 for the week ending February 10, 1996 and $820.80 for the week ending February 17, 1996. (EX-47). However, Employer's payroll records indicate that Claimant departed Croatia on February 13 and had earned $2,916.32, including wages and included expenses, through February 15 when he arrived back in Texas. (EX-51).

Several important facts exist in the personnel file of Claimant, which Employer submitted into evidence. Claimant's resume lists the following employment history:

Employer	**Dates**
Self-employed in Florida Keys, FL	April 1993 – August 1995
Collett Electric, Las Vegas, NV	October 1994 – February 1995
Pacific Architects & Engineers, Fort Carson, CO	February 1995 – October 1995
CIMCO Sterling Chemical Plant, Texas City, TX	October 1995 through date that resume was submitted to Employer

(EX-31). There are several reports of Claimant's injury in the file. Of significance, Claimant's superiors recorded accusations from Claimant that he was refused food for two days. One of Claimant's superiors reports that Claimant was in noticeable pain and was very vocal about the pain. In addition, Employer terminated Claimant on February 27, 1996 by virtue of a "Status Report Change" form. A report was filed on February 28 alleging that Claimant was being rude and disruptive, which supposedly led to his termination. In addition, it seems that Claimant was not paid wages due to him in February until mid-April.

Claimant's History of Earnings

Employer also submitted evidence regarding Claimant's wage earning history. The employment records from Crown Technical Services show that Claimant was employed by that company for three weeks in February of an unspecified year. He was paid at a rate of 14 dollars per hour and worked 18 hours of overtime in the second week but no overtime in either of the other two weeks. (EX-54). The employment records of Delta Diversified show that Claimant was paid at the rate of 12 dollars per hour, which was only a base rate and that he was also to receive an expense check that would add up to 14 dollars per hour. (EX-55). He was paid time and a half for overtime. Claimant worked for Delta Diversified from February 6, 1995 until May 15, 1995 and earned a total of $7,413.00 during this period according to his W-2 form. (EX-54).

Medical Evidence

Employer introduced medical evidence from a number of different doctors, including the deposition testimony of Dr. Barrash, who specializes in neurological surgery and treated Claimant in Houston, Texas on February 15, 1996, upon his return from Croatia. (EX-38). Dr. Barrash testified that when he first saw Claimant he appeared to be overmedicated. Upon examination, he found that Claimant's back was hyper-extended and he could only flex twenty degrees. The only radiological test performed was a standard x-ray, which showed narrowing of the discs at the L4-5 and L5-S1 regions. He admitted Claimant to St. Luke's Hospital in Texas and began conservative treatments, which included traction and physical therapy. By February 22, Claimant was asymptomatic and released by Dr. Barrash to return to Croatia. On cross-examination, Dr. Barrash testified that Claimant was in acute distress when he first met with him. When asked why Claimant was sent to Texas to see him since Claimant's employment records clearly indicated that his point of origin was New York, Dr. Barrash first responded that it was for the reason of seeking adequate treatment. (EX-38). However, other evidence seems to suggest that Employer wanted Claimant to see Dr. Barrash because Dr. Barrash is Carrier's consultant.[9]

Employer also introduced the deposition of Dr. Anthony Leone into evidence. Dr. Leone is a board certified orthopedic surgeon, who has fellowship training in spine reconstructive surgery. (EX-35). He conducted an independent examination of Claimant on February 24, 2003 after collecting a medical history from him and reviewing his previous medical records. He briefly explained each of the two surgeries that Claimant underwent and described them as necessary and reasonable. Dr. Leone testified that he reviewed a myelogram taken on March 13, 2002 and that it showed that the cages that were put into Claimant's back during his second surgery in 1998 were intact and stable. Further, the doctor did not see any herniation or significant degeneration of the discs but noted slight degeneration which he attributed to age.

Dr. Leone notes that Claimant had difficulty and noticeable pain when walking and standing. He had decreased strength in his right foot and right big toe. However, when Dr. Leone had Claimant hold his leg straight and bend his hip, Claimant experienced back pain but no pain in the leg, which indicated a lack of disc herniation or spur. Dr. Leone found Claimant's

[9] I find the rest of Dr. Barrish's testimony to be unhelpful, as it regarded Claimant's condition subsequent to February of 1996, and Dr. Barrish has not seen Claimant in the eight years that have elapsed since then.

range of motion to be limited. In addition, Dr. Leone testified that sexual dysfunction is a common complication of anterior fusion surgery that a patient should be warned about.

Dr. Leone felt that Claimant was capable of doing light or sedentary work, such as a desk job, and recommended a functional capacity exam to investigate that possibility further. He recommended that this exam be performed by an institution able to monitor a patient's effort since a patient reluctant to return to work could simply use minimal effort in completing a functional capacity exam. However, when discussing the results of that exam, Dr. Leone did not label Claimant as uncooperative. He noted that Claimant refused to perform lifting exercises but noted that Claimant reported being able to lift about twenty pounds, and in Dr. Leone's words, "You wouldn't want him to lift more than 20 pounds." (EX-35). After reviewing the results of the exam, Dr. Leone still felt that Claimant was capable of doing some type of work, but said he would not recommend lifting, bending, twisting, pushing, pulling or repeated overhead activities. It was his testimony that he believed that Claimant should attempt to work a four to six hour shift and should drive for only thirty minutes without stopping.

Dr. Leone described Claimant as "very honest," cooperative and sincere. In addition, he testified that Claimant's self-reports are corroborated by his medical records.

It was the testimony of Dr. Leone that Claimant's current symptoms are the result of his 1996 work-related injury. He noted that Claimant had a marked, permanent disability when he saw Claimant in February of 2003. In addition, Dr. Leone testified that Claimant's condition is aggravated by "his overweight deconditioned status and history of smoking." It is Dr. Leone's opinion that no further treatment of the injury is needed but that Claimant should continue to see the pain management specialist. (EX-35).

The report of Dr. James of Buffalo General Hospital was accepted into evidence. This report pertains to a February 15, 1999 exam of the patient. (EX-58). Dr. James notes that there is a new compression fracture of the L2 vertebral body, indicating that the bones are osteopenic. He also notes that the cage placed at L4-L5 during the fusion surgery was loosening.

Several reports of Dr. Rubin, a radiologist for Kaleida Health, are in evidence. (EX-58). The date of the reports is unclear but they followed the fusion surgery and contain the results of several CT scans. Of significance from these reports, Dr. Rubin noted in several reports that there were changes around the L4-5 cages, suggesting some loosening. In addition, he saw spondylosis and osteoarthritis in several areas of the spine.

Dr. Rand, also of Kaleida Health, performed a lumbar myelogram on March 13, 2002. He concluded from that test that Claimant is not suffering from any disc bulge or herniation. He found no evidence of spinal stenosis. Upon performing a CT scan, Dr. Rand reported mild bilateral neural foraminal stenosis at L5-S1. He did not detect any spinal stenosis or osteoarthritis.

Dr. Sheehan, who it appears is Claimant's family doctor, reported several times that Claimant was depressed, nervous, agitated or "disappointed." There are also reports of Claimant not following through on his medical treatment due to financial inability, depression or severe pain. (EX-62).

Vocational Evidence

Joseph Higgins, an employee of Work Capacity Center, performed a functional capacity evaluation of Claimant on September 25, 2003. Both the report and the deposition of Mr. Higgins were admitted into evidence. (EX-40, 41). Mr. Higgins has a Bachelor of Science Degree in Occupational Therapy and reports that he specializes in backs and upper extremities. (EX-39).

On the day of the evaluation, Mr. Higgins observed Claimant as he entered the office and filled out paperwork. Claimant sat for this 40 minute period and then stood and stretched his back and walked about when finished. Mr. Higgins reports that the test results show inconsistent effort, implying that Claimant was not really trying, and that Claimant's limp and some of his reactions were not within expected parameters, or in other words, were exaggerated. Claimant refused to perform a test that involved lifting, telling Mr. Higgins that he did not want to experience the pain that lifting causes him. (EX-41).

On cross-examination, Mr. Higgins testified that the test that Claimant refused to perform is the test that is most directly related to back pain. The other tests do not share a strong relationship to back pathology, but instead tested things such as dexterity and grip. Mr. Higgins also admitted that he was forced to rely on the test results that he deemed inaccurate due to Claimant's alleged lack of effort, his observations and Claimant's self-reports. He also testified that the difference between an occupational therapist and a vocational rehabilitation specialist is that occupational therapists deal in medical rehabilitation and testing processes and not with the education and vocational training of each individual. (EX-41).

Despite these admissions and limitations, Mr. Higgins felt qualified and prepared to determine that Claimant is capable of performing sedentary to light work for four to five hours per day. However, he recommended that Claimant not seek employment that would require lifting more than twenty pounds, bending, squatting, or more than occasional reaching or foot control. Mr. Higgins also felt that Claimant should sit for only sixty minutes at a time and for a total of three to five hours in an eight hour period. He should stand for a maximum of thirty-minutes at a time and should not exceed two hours of standing in an eight hour period. Finally, Mr. Higgins felt that Claimant is capable of walking for only five to ten minutes at a time for a maximum of one hour per every eight hours. (EX-40).

Employer introduced into evidence the curriculum vitae and transferable skills analysis report of Cathy Russo. (EX-42). Ms. Russo has a masters of science degree and is a certified rehabilitation counselor. From 1999 until the present she has worked with the developmentally disabled, counseling them and helping them to find work. (EX-42). It appears from the record that Ms. Russo never met with Claimant but was supplied adequate information to conduct the transferable skills analysis. (EX-43). Upon doing so she found that Claimant was qualified to

work as an electrical superintendent, which is classified as a light duty job, or as a construction consultant, which is classified as sedentary work. Ms. Russo found that Claimant's skills also prepared him to work as a maintenance director, project manager or facility supervisor. She identified 30 such employers in the geographical region and contacted 15 of them. However, of those 15 employers, 5 reported having one full-time position available and one company reported that they had available position(s) but did not specify that there were part-time positions available. The remaining 9 employers did not report whether they had any positions available. (EX-43).

In addition to Ms. Russo's report, Employer submitted the report of Susan Rapant, who is also a certified rehabilitation counselor.[10] (EX-68). This time, it was suggested that Claimant could work as a self storage clerk, an answering service operator, in the security field or the loss prevention/surveillance field. A labor market survey was then performed in early May of 2004. Ms. Rapant identified 7 employers who were hiring at that time.

The first employer listed by Ms. Rapant is AAA Abbott Answering Bureau. The job required "some PC skills, good phone voice and great customer service skills." The second identified position is with Home Depot's call center. The position is just under 20 miles from Claimant's home and requires some walking and that the applicants pass an employment test. The next position was classified as "Property Relief Manager" for Hamburg Self Storage. This was primarily a sales position that required occasional showing and cleaning of the property. Ms. Rapant identified an available security position for Securitas USA. The position required occasional walking and was over 18 miles from Claimant's home. The final three jobs identified by Ms. Russo were all loss prevention jobs and required occasional walking. One of these three positions was 27.55 miles from Claimant's home.

Ms. Rapant noted that each of the seven employers offers part-time work. However, she did not specify whether an employee was permitted to work only a few hours per day and in fact, Claimant testified that he learned that some of these employers required even a part-time employee to work eight hours shifts. (EX-68).

In a follow up report, Ms. Rapant reported that between June 4th and June 9th of 2004, she again contacted each of the 7 employers. Of those seven employers, five reported that they did not have Claimant's resume or an application on file. JC Penney would not release any information due to company policy. The appropriate contact person listed by AJ Wright could not be reached despite Ms. Rapant's efforts. (EX-69).

Other ALJ Decisions

Employer submitted two decisions recently issued by other administrative law judges involving similar issues as those presented here. Both were claims for compensation filed under the DBA and Employer was a party to both. (EX-80, 81).[11] I prefer that counsel cite decisions in their briefs and attach a copy of the decision if they wish, rather than submitting decisions into

[10] Ms. Rapant is also a certified disability management specialist, a certified case manager, certified by the U.S. Department of Labor and a vocational expert for the Social Security Administration. (EX-68).
[11] One of the suits names Brown & Root as the Employer. However, Brown & Root is the parent company of SEII.

evidence. However, there was no objection so I received these two decisions into evidence and considered them as such.

The first involved a neck and back injury allegedly suffered by the claimant while working in Bosnia, but the ALJ found that the neck injury was only a temporary disability that healed shortly after the accident and that the back injury was not the result of the claimant's work related accident. (EX-80).[12] In calculating AWW, the ALJ declined to include the wages earned in Bosnia and calculated AWW pursuant to § 10(a) based on the previous year's wages. While this calculation method is favorable to Employer, the case is easily distinguishable since here we have a permanent disability and there is no dispute as to whether that disability was caused by the work-related accident.

The second ALJ decision that Employer submitted into evidence also involved a truck driver who was injured while in the Balkans one week after his arrival. (EX-81).[13] There, the ALJ computed AWW pursuant to § 10(c) because he found that working overseas is equivalent to a raise or a promotion, and if not considered in computing AWW, the result is inequitable. The ALJ looked back at the wages earned by the claimant over a five year period and also included the wages that Employer would have paid him pursuant to the three month contract, had he not been injured. (EX-81).

Correspondence Between Employer and Claimant's Croatian Counsel

Employer introduced correspondence between it and Claimant's Croatian counsel, Niko Durić, showing that a suit resulting from the same injury is pending in a Croatian court. (EX-26). Employer's letters explain its belief that Claimant's sole remedy is pursuant to the DBA. Also included in this exhibit are settlement negotiation letters and Mr. Durić's letter reporting that he dropped the suit against Employer but was pursuing the cause of action against Carrier. In addition, Mr. Durić explains in a letter to Employer's counsel that the Croatian law grants two types of compensation, which are labeled immaterial and material damages. Under immaterial damages, a claimant is entitled to compensation for physical pain, hardship in both life and at work, and for fear at the time of the accident and during subsequent operations. Under material damages Claimant is entitled to collect his loss of earnings and medical costs. (EX-35).

B. Discussion

1. Claimant has no alternate earning capacity and is entitled to total disability benefits under the Act.

Claimant contends that he is totally disabled while Employer believes that Claimant has an alternate earning capacity and is thus only partially disabled.

Disability under the Act means an incapacity, as a result of injury, to earn wages that the employee was earning at the time of the same or any other employment. 33 U.S.C. § 902(10). It is necessary to classify an injury as either permanent or temporary and as either total or partial

[12] *Bolton v. SEII*, case no. 2002-LHC-0084 (2003).
[13] *Stoessel v. Brown & Root, Inc.*, case no. 2002-LHC-649 (2003).

for purposes of applying some provisions of the Act.

To establish a prima facie case of total disability, the employee must show that he is unable to return to his usual employment due to the injury. If the claimant establishes a prima facie case, the burden shifts to the employer, who must then show that suitable alternative employment exists. *Clophus v. Amoco Prod. Co*., 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).

The employer meets this burden by showing that actual employment opportunities exist--by identifying specific jobs in the local community that are available to the claimant. *Armfield v. Shell Offshore, Inc*., 30 BRBS 122, 123 (1996). The employer also must show that claimant could perform such jobs given his age, education, work experience and physical restrictions. *Edwards v. Director*, OWCP, 99 F.2d 1374 (9th Cir. 1993); *cert*. *denied*, 511 U.S. 1031 (1994).

The factfinder is to determine the claimant's restrictions based on the medical evidence and decide whether the claimant is capable of performing the jobs identified by the employer. *Villasenor v. Marine Maintenance Indus.*, 17 BRBS 99 (1985). Employer must show that the job opportunities are realistic and does so by establishing the nature, availability and terms of the employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). Here, at the very least, Employer would need to show that the identified employment opportunities would allow for Claimant to work short shifts and would involve little physical exertion.

If the employer meets this burden, the claimant must then prove that he has made a diligent attempt to secure employment. *Palombo v. Director,* OWCP, 937 F.2d 70; 25 BRBS 1 (CRT) (2nd Cir. 1991).

The parties agree that Claimant cannot return to his usual work as an electrician or electrical foreman. Claimant has thus established a prima facie case of total disability and the burden shifts to Employer.

Although the medical testimony of the numerous experts who were called upon in this case differs marginally, it is clear that Claimant suffers from a major back injury that required two surgeries and years of extensive testing and treatment. His pain was described by various physicians as acute, noticeable or obvious. It is undisputed that he takes a narcotic to relieve his pain on a daily basis.

Based on the expert testimony, I find that Claimant is restricted to working three hours per day, during which time he cannot sit for more than one hour at a time, stand for more than twenty minutes at a time, and should not be in a position that requires even occasional walking, since he is advised to walk for only five minutes at a time. In addition, I find that Claimant cannot perform a job that requires him to bend, twist, squat, reach or lift.

Basically, Claimant would need to find a job within a half an hour of his home, that requires limited exertion, that he could work in three-hour shifts and that would allow him to work the hours of his choosing or was such that permitted his absence on days when the pain is so severe that he cannot make it to work. Employer has not demonstrated that such a job exists.

Some of the jobs identified by Employer require "occasional" walking, but do not specify what qualifies as "occasional." One job requires computer and customer service skills and another requires selling. It is not clear from the record that Claimant possesses customer service or sales skills. Three of the jobs are such a distance from Claimant's home that I am not assured that his commute would be less than thirty minutes. In addition, Claimant has testified that some of the jobs that Employer identified required working eight hour shifts although they were labeled part-time jobs.

While the record suggests that Claimant is theoretically capable of performing some types of work, Employer has not demonstrated, and it is unrealistic to find, that Claimant can become gainfully employed given the restrictions placed on him. Thus, I find that Claimant is totally disabled.

2. Maximum medical improvement was reached on November 16, 2001.

It is uncontested that Claimant's injury is permanent although the party's disagree as to the date that MMI was reached.

A claimant is permanently disabled if after reaching maximum medical improvement, he has a residual disability. *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). The date that MMI is reached is to be determined by medical factors without regard to a claimant's economic situation. *Id.* Generally, if further surgery is anticipated, MMI has not been reached. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). However, the mere possibility of surgery does not automatically preclude a finding of permanency. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986). Instead, an inquiry must to be made as to whether treatment continues to be curative or has become palliative. *Leech v. Service Engineering Co.*, 15 BRBS 18, 21(1982). Palliative treatment is that which focuses on pain reduction rather than curing the condition. *Henry v. Candy Fleet Corp.*, 2001 WL 121913 (E.D.La. 2001).

Claimant contends that he reached MMI on November 16, 2001. On that day, Dr. Capicotto, Claimant's treating physician reported that Claimant's condition had remained the same over the course of a few months and described him as "totally disabled on a permanent basis." However, the same report states that additional surgery was discussed and Claimant was considering it. (CX-2). Employer argues that MMI was not reached until February 24, 2003 based on the report of Dr. Leone. (EB at 28). In that report, Dr. Leone noted that no further "diagnostic testing or surgical treatment is needed at this time," but that was the first time that Dr. Leone had examined Claimant. (EX-34).

I find that Dr. Leone's testimony is helpful in the resolution of this issue only to the extent that it proves that MMI was reached sometime prior to February 24, 2003. It is unhelpful in determining a more precise date. Dr. Capicotto, on the other hand, saw Claimant fairly regularly through 2001 and was able to observe his condition. In his opinion, Claimant's condition had not changed for a few months and Claimant was permanently disabled by November 16, 2001. Although Dr. Capicotto's November 2001 report mentions that surgery was discussed, this does not automatically preclude a finding that MMI was reached. In fact, no surgery ever did occur after that. Furthermore, the record is void of any information suggesting

that Claimant received any treatment, other than for pain, after that date. Therefore, I find that Claimant reached MMI on November 16, 2001 and has been permanently disabled since that date.

3. Claimant's AWW should be calculated pursuant to § 10(c) of the Act and is $840.56 per week.

There is a dispute as to how Claimant's average weekly wage should be calculated. Employer argues for a calculation pursuant to § 10(a) of the Act while Claimant argues that AWW should be calculated using the method described in § 10(b).

AWW is determined by utilizing one of three methods set forth in §10 of the Act. 33 U.S.C. §910. Section 10 of the Act, reads as follows:

> SEC.10. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
> (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earning if a six-day worker, shall consist of three hundred times the average daily wage or salary and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.
> (c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earnings capacity of the injured employee.

Section 10(a) applies when a claimant has worked in the same employment for substantially the whole of the year immediately preceding injury. Section 10(b) also applies to permanent and continuous jobs, but applies where claimant has not been employed for substantially the whole of the year, and claimant submits evidence of the wages of similarly situated employees who have worked substantially the whole of the year. Section 10(c) provides a general method for determining average weekly wage where §10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of injury. *See generally Barber v. Tri-State Terminals, Inc*., 3 BRBS 244 (1976), *aff'd sub nom*. *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The ALJ has broad discretion in determining annual earning capacity under Section 10(c). *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*. 600 F.2d 128 (9th Cir. 1979).

Employer argues that Claimant, by his own admission, worked for most of the year preceding his injury in substantially similar employment as that which he was employed to do when he was injured, placing him neatly within the confines of § 10(a) of the Act. (EB at 43). In the alternative, Employer argues that Claimant's AWW should be calculated pursuant to § 10(c). Claimant argues that his AWW should be calculated under subsection (b).

I generally agree with Employer that Claimant meets the requirements for calculation under subsection (a). Claimant's resume, which he submitted to Employer, clearly shows that Claimant worked continuously, although for many different employers, as an electrician and electrical foreman, throughout the year prior to his disabling injury. When viewing the resume that Claimant submitted to Employer, Claimant's social security records and Employer's "Personal Information Supplement" form, which Claimant filled out, it is clear that in the twelve months preceding the injury, Claimant worked continuously in the electrical field.

In order to use § 10(b) to determine AWW, I must first find that Claimant did not work in similar employment as that in which he was injured for the majority of the previous year. As I noted above, Claimant, by his own admission, did work the majority of that year as an electrician and electrical foreman, using the same skills and training that he was expected to use overseas while working for Employer. Claimant has argued that § 10(b) should be applied despite the evidence to the contrary, probably because §10(b) would take into account only Claimant's foreign wages and would result in a windfall for Claimant. I find § 10(b) not applicable here.

Section 10(c) is appropriate when neither (a) nor (b) leads to a reasonable and fair result, such as where looking only to the previous year's earnings would yield harsh results. *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319, 322 (D.C.Cir. 1986). The BRB has held, and the Seventh Circuit affirmed, that § 10(c) should be used where the industry was booming and there was evidence that in the year following the claimant's injury, similar workers made triple the salary that they had made in the previous year. *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 754 (7th Cir. 1979). The BRB and the court agreed that § 10(c) focuses on earning capacity and earning capacity is "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Id.* at 757.

Claimant has demonstrated that his earning capacity is much higher than what the record shows he earned in the twelve months prior to this injury. Not only was he making a

substantially larger amount of money while working for Employer, but he also spent almost a decade working in the Cayman Islands. His employment history shows that he traveled from coast to coast, working on many different projects for many different employers in several different locations in any given year. Presumably, Claimant's annual salary differed substantially from year to year. I find that a calculation under § 10(a) would lead to an inequitable result, as it requires a computation based solely on the wages earned by Claimant in the fifty-two weeks preceding the injury. I find that to be an unreasonable and unfair measure of Claimant's wage earning capacity, as it does not reflect the most recent change in Claimant's earning capacity, namely working in hazardous and primitive conditions in Bosnia, which occurred just prior to his workplace injury.

The Benefits Review Board (BRB) affirmed the decision of an ALJ who calculated a claimant's wages pursuant to § 10(a), where the claimant had worked six of the twelve months preceding the injury in Saudi Arabia. *Mulcare v. Ernst, Inc.*, 18 BRBS 158, 159 (1986). There, the claimant was employed as a union journeyman electrician in Washington, D.C. for over eight years before going to Saudi Arabia to work for the same employer. While in Saudi Arabia, the claimant was receiving "very lucrative compensation and benefits." *Id.* He was not injured until returning to his regular job in D.C. However, when calculating his AWW under § 10(a), which looks to the previous year's earnings, the higher rate of compensation paid for those six months was included. The ALJ held that this was a fair representation of the earning capacity that the claimant had achieved prior to his injury. The BRB found that the ALJ's calculation was "rational, supported by substantial evidence, and in accordance with the law." *Id.* at 161.

I realize that in *Mulcare* the employer was arguing against a calculation pursuant to § 10(a) while here Employer is requesting such a calculation. I find that irrelevant. *Mulcare* supports the conclusion that overseas employment demonstrates an increase in an employee's earning capacity and therefore ought not to be ignored.

On the other hand, it is clear to me that Claimant could not expect to work in Bosnia the rest of his working life. As Employer has demonstrated, that simply is not the nature of the work. I do not wish to speculate as to how long Claimant would have been in Bosnia barring this injury, although I do think it is clear from the record that he likely would have been there for some period longer than three months.

Based on the foregoing, I find that the only true representation of Claimant's earning capacity is some compromise between what he earned in the United States and what he would have earned for the three months that he worked in Bosnia under the employment contract entered into by Claimant and Employer.

Section 10(c), when read only in relevant part, provides that a claimant's "average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working *at the time of the injury…or other employment of such employee*…that shall reasonably represent the annual *earning capacity* of the injured employee." (Emphasis added). First, I note that subsection (c) allows use of both the employment at the time of the compensable injury and of employment preceding the injury. I find that to be the only equitable way to determine Claimant's AWW—to consider both the wages that he was capable

of making while in Bosnia under contract with Employer and his employment in the year prior to this disabling injury.

Second, I note that subsection (c) focuses on earning capacity rather than actual earnings. Its use is appropriate when an employee receives a promotion or raise just prior to the injury and § 10(a) therefore does not accurately reflect the employee's AWW. *See, i.e. Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBSA 175, 177 (1986). It is appropriate here then, because just prior to his injury, Claimant had experienced a large change in earning capacity by virtue of working in the dangerous and primitive conditions present in Bosnia at that time.

Under these circumstances § 10(c) must be used to determine Claimant's AWW, which require me to compute Claimant's average annual wage and then divide that number by fifty-two to arrive at AWW, according to § 10(e). *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

According to the Social Security records, Claimant earned $34,801.99 in 1995 and 1996, not considering his 1995 earnings reported by Collett Electric, since Claimant reported that he was employed there only until February of 1995, putting this employer beyond the relevant twelve month period. Claimant's wages, had he worked a full month in Bosnia, would have been $5,869.05[14] per month, or $17,607.15 for three months. Therefore, in order to arrive at Claimant's AWW, I added $17,607.15, which accounted for three months of the year, to ¾ of $34,801.99 (which equals $26,101.50) to represent the remaining nine months of the year. Therefore, I find Claimant's annual earning capacity to be $43,708.65 and his average weekly wage to be $840.56 ($43,708.65 ÷ 52 weeks).

I note that Claimant testified that he made between 1,400 and 4,000 dollars per week prior to his injury. However, this testimony is not only uncorroborated but also contradicted. I also note that since Claimant neglected to file income tax returns for the past twenty-five years, he lacks the best possible evidence of his actual earnings. Being mindful that courts have construed doubts arising under § 10(c) in favor of the employee, Claimant has left me no alternative but to rely on the most reliable evidence introduced by the parties. I find that evidence to be the Social Security records coupled with the employment contract entered into between Claimant and Employer and have calculated AWW in the most equitable way I find possible under such circumstances.

4. Claimant is entitled to medical treatment for the sexual dysfunction that he has suffered from since becoming disabled by the subject injury.

Claimant alleges that he contracted Hepatitis C as a result of a dirty needle used during his treatment while in the hospital in Croatia. He also believes that the sexual dysfunction that he experienced post-surgery was a direct result of that surgery.

[14] Pursuant to his employment contract, while in Bosnia, Claimant was to be paid a base rate of $3,557, plus a 15%foreign service bonus ($533.55), plus two 25 percent incentives, one being a work area differential and one being hazard pay (2x$889.25=$1,778.50). These figures added together equal the monthly wage of $5,869.05.

An employer who is held liable under the Act for compensation is also liable for all medical expenses resulting from the injury so long as they are reasonably and necessarily incurred. *Perez v. Sea-Land Services, Inc*., 8 BRBS 130 (1978). In addition, if the claimant sustains another injury that is a natural result of the primary injury, both injuries are compensable. *Cyr v. Crescent Wharf & Warehouse Co*., 211 F.2d 454, 457 (9th Cir. 1954). Similarly, an employer is liable for the mistake or lack of skill of a treating physician. *Lindsay v. George Washington University,* 279 F.2d 819 (1960).

Claimant establishes a prima facie case of causation by showing that an employment accident occurred and could have caused, aggravated or accelerated a physical harm. *American Stevedoring Limited v. Marinelli*, 248 F.3d 54, 64 (2nd Cir. 2001); *Port Cooper/T. Smith Stevedoring Co., Inc. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000). Once a prima facie case is established, the employer must introduce substantial evidence to rebut the presumption. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). This requires specific, sufficient evidence severing the causal nexus between the employment and the injury. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1083 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 820 (1976).

The parties identified the causation of these two conditions as an issue at the formal hearing. However, no where in the record does it become clear as to who, if anyone, has paid for the treatment of these conditions until this point. The most specific request for relief comes from Claimant who asks in his post-hearing brief that I find that "claimant's sexual dysfunction is causally related to the injury and that claimant is entitled to treatment therefor." (CB at 28). Accordingly, that is the only issue that I reach.[15]

I find that Claimant has established a prima facie case of causation. He testified, without contradiction, that he suffers from sexual dysfunction, which he did not experience prior to his surgery. He sought treatment from Dr. Perfetto for this problem and was advised that it could be a side effect of one of his pain medications. In addition, Dr. Leone noted that sexual dysfunction commonly results from the surgery that Claimant underwent--so common that a patient should be warned of it before the operation is performed. Dr. Capicotto also testified at his deposition that he believes the majority of this condition is a result of Claimant's back injury.

In an attempt to rebut Claimant's prima facie case, Employer relies on testimony showing that Claimant went to the emergency room for treatment of a condition that could possibly have stemmed from a sexually transmitted disease. However, Employer admits that although listed as a possibility, this was never confirmed. (EB at 24). Employer also makes an argument based on Claimant's credibility. I find that Employer fell short of offering substantial evidence in this regard and am thus compelled to find that Claimant's sexual dysfunction is casually related to his disability and he is entitled to medical treatment therefor.

[15] There is also a fair amount of evidence in the record suggesting that Claimant suffered a fracture in his back due to a car accident. Claimant contends that he suffers from drop foot as a result of his work related injury and this impairment caused him to have such an accident. Employer contends that such an accident could not occur in the manner that it did as a result of drop foot. Again, no specific relief was requested regarding this event so I do not reach this issue.

5. There exists no jurisdiction to dismiss the suit that Claimant filed against Carrier in Croatia.

Employer, in its post-hearing brief, asks that I make a determination that Claimant's exclusive remedy is provided by the DBA. (EB at 54). Counsel for Employer identified this as an issue at the formal hearing and counsel for Claimant indicated a request to be heard. I requested that the issue be argued in brief form rather than orally. However, Claimant's brief does not address the issue at all while Employer's brief cites no case law in support of its position and points to no statutory or regulatory authority that vests me with such power.

I note that Section 903(e) of the Act provides that any amount that the employee recovers for the same disability under any other workers' compensation law or § 688 of Title 46 (relating to personal injury and wrongful death suits)[16] must be credited against the employer's liability imposed by the Act. 33 U.S.C. § 903(e). However, the DBA also contains its own relevant provision, which reads in part, "The liability of an employer…under this chapter shall be exclusive and in place of all other liability of such employer…under the workmen's compensation law of any State, Territory, or other jurisdiction." 42 U.S.C. § 1651.

At least one United States District Court has granted summary judgment to the Employer, precluding a tort claim, where the Claimant filed both the tort claim and a claim under the DBA seeking recovery for the same injury. *See Colon v. U.S. Department of the Navy*, 223 F.Sup.2d 368 (D.P.R. 2002). I must note that there, the tort claim was pending before the district court. Here, the suit that Employer seeks to have dismissed is pending in a Croatian court under Croatian law. This decision is not helpful in the sense of supporting jurisdiction to dismiss the Croatian case.

Some courts have granted a credit to the employer, equal to the amount that a claimant received under another workman's compensation program, where claims were filed under both the DBA and another workman's compensation program. Thus, if Carrier had proven that Claimant was seeking compensation in Croatia under a Croatian workers' compensation law, Employer may have been entitled to such a credit. In *Lee v. The Boeing Company, Inc.*, 7 F.Supp.2d 617 (1998), the court declared that "Although the DBA may be an employer's exclusive liability, it is not necessarily an employee's exclusive remedy." Although Boeing's subsidiary had paid premiums to the General Organization, which is the governmental entity that administers the Social Insurance Law, Boeing was still held liable to the claimant under the DBA. But because the Saudi Social Insurance Law was deemed a workers' compensation program, Boeing was entitled to have the amount paid under that program to offset the amount it was responsible for paying pursuant to the DBA. Here it is not clear from the record exactly what type of suit Claimant has filed in Croatia. In addition, Employer has not asked for such a credit. I accordingly cannot grant any relief regarding the suit that Claimant filed in Croatia, under these case authorities.

[16] 46 U.S.C. § 688 is more commonly referred to as the Jones Act.

ORDER

On the basis of the foregoing, Employer shall:

(1) Pay Claimant compensation benefits for total temporary disability from February 10, 1996 through November 15, 2001 and total permanent disability from November 16, 2001 through the present and continuing, based on Claimant's average weekly wage of $840.56.

(2) Take a credit for any compensation already paid, taking into account that Claimant has been underpaid since August 20, 2003.

(3) Pay all medical benefits as required by Section 7 of the Act, including treatment for sexual dysfunction.

(4) Pay Claimant's attorney fees and costs to be established by supplemental order.

A

RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey